REPLY BRIEF OF APPELLANT

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

15-3389

TODD N. VANDERVORT

Appellant

v.

ROBERT A. MCDONALD
SECRETARY OF VETERANS AFFAIRS,

Appellee.

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APPELLANT'S REPLY ARGUMENT

I. The Secretary's argument that the Board appropriately relied on medical evidence to conclude that the Veteran's reported knee buckling was not lateral instability must fail.

The Secretary agrees that the Veteran is competent to describe the symptoms he experiences with regard to his knee instability. Sec. Br. at 12. The parties ultimately disagree about whether the Board is competent to find that the Veteran's description of buckling was not the type of instability contemplated by 38 C.F.R. § 4.71a (2016). The answer to this question is no.

The Secretary argues that the Board did not offer its own medical opinion, but rather, supported its determination that buckling was not the type of lateral instability contemplated by § 4.71a with medical evidence. Sec. Br. at 9-10. Specifically, the Secretary notes that the Board cited the February 2009 VA examination and the March 2013 VA examination, as well as the September 2012 VA treatment note. *Id.*; *see* R-96-107; R-423-29; R-717-18. The Board relied on the fact that instability testing was negative upon VA examination, and the September 2012 examining physician noted no instability. R-8. In other words, the Secretary argues that these medical reports, which do not reflect instability on clinical testing, support the Board's determination that the buckling described by the Veteran is not the type of instability contemplated by § 4.71a. This argument must fail.

While it is true that objective testing was not positive for lateral instability this does not provide sufficient evidence to support the Board's conclusion regarding

what the *cause* of the Veteran's symptoms are or what they more closely resemble. *See* Apa. Open. Br. at 7-8; R-8. This assessment requires medical expertise which the Board does not possess. Thus, its conclusion regarding the cause and nature of the Veteran's symptoms is improper as it lacks citation to any supporting medical authority. *See Colvin v. Derwinski*, 1 Vet.App. 171, 172 (1991).

Only a medical professional is competent to opine whether the Veteran's reports of "buckling" are the same or different than symptoms of lateral instability. *See Colvin*, Vet.App. at 172. Furthermore, the Board cannot reject a veteran's lay testimony merely because the statements are not corroborated by contemporaneous medical records. *Buchanan v. Nicholson*, 451 F.3d 1331 (Fed. Cir. 2006). Simply because the Veteran did not demonstrate objective evidence during the examinations, does not mean he did not experience instability at other times during the period on appeal. *See* 38 C.F.R. § 4.2 (2016) (exam reports need to be read in light of whole recorded history); Apa. Open. Br. at 8-9. The DC contemplates "recurrent" instability. 38 C.F.R. § 4.71a, DC 5257. Recurrent means its occurs periodically. Therefore, the Secretary's argument that the Board correctly relied on the VA medical records to conclude that buckling was not lateral instability, must fail.

Next, the Secretary argues that the Board's finding that the Veteran had not reported losing his balance or falling, was not prejudicial error since he does not experience the type of instability contemplated by diagnostic code 5257. Sec. Br. at 13-14; R-8. This argument is circular: aside from the fact that the Board was not

competent to make that determination in the first place, the Board's finding that the Veteran did not report losing his balance or falling necessarily informed its determination. R-8; *see Wagner v. United States*, 365 F. 3d 1358, 1365 (Fed. Cir. 2004) ("Where the effect of an error on the outcome of a proceeding is unquantifiable, however, we will not speculate as to what the outcome might have been had the error not occurred"). The Board was required to adequately discuss the Veteran's report of needing his cane to keep from falling because this evidence showed the Veteran's problems with ambulation and falling, which would be relevant in determining whether the Veteran was entitled to a separate rating under DC 5257. Apa. Open. Br. at 6; *see* R-36.

Finally, the Secretary suggests that the Board did not have to address the Veteran's description of buckling in its functional loss or extraschedular analysis, because that symptom was already contemplated by his 10 percent rating, and the extraschedular issue was not reasonably raised. Sec. Br. at 12-13. But the Board did not discuss how the Veteran's symptom of buckling was contemplated by his current 10 percent rating. *See* R-8-13. Simply because the Board found that it was not contemplated by DC 5257 does not automatically mean that it was contemplated by his current rating. The Board was required to discuss how the Veteran's buckling symptom impacted his overall functioning, and whether it resulted in increased limitation of motion, or other functional limitation not contemplated by the schedular criteria. *See* Apa. Open. Br. at 11; 38 C.F.R. §§ 4.40, 4.45, 4.59 (2016); 38 C.F.R. §

3.321(b) (2016). Furthermore, if after the Board performed this analysis, it determined that the type of functional limitation that the Veteran experienced was not contemplated by his current 10 percent rating, then it necessarily would raise the issue of whether extraschedular referral was warranted. *See Thun v. Peake*, 22 Vet.App. 111 , 115 (2008) (The threshold element for an extraschedular rating is met where the diagnostic criteria do not reasonably describe or contemplate the severity and symptomatology of a veteran's service-connected disabilities.").

II. The Board's analysis regarding a separate rating under DC 5258 was inadequate, and the Secretary's argument to the contrary is unavailing.

The Secretary argues that the Veteran's second argument must fail because there are no frequent episodes of effusion. Sec. Br. at 14-15. The Secretary completely failed to address the Veteran's argument that the Board failed to explain how it concluded that the effusion noted in March and April 2010 did not constitute frequent episodes of effusion. Apa. Open. Br. at 13; Sec. Br. at 14-15; R-11; R-222; R-242; 38 U.S.C. § 7104(d). Additionally, the Secretary did not provide any reasons for disagreeing with the Veteran's argument that the Board was required to apply §§4.3, 4.7, and 4.21. Apa. Open. Br. at 12; *see MacWhorter v. Derwinski*, 2 Vet.App. 133, 136 (1992) (Court noting that where the Secretary fails to respond appropriately, "the Court deems itself free to assume, and does conclude, the points raised by appellant, and ignored by the General Counsel, to be conceded."). Instead, the Secretary inexplicably stated that the Board was not entitled to consider these sections. Sec. Br.

at 15. But not only was the Board entitled to consider them, it was required to. *See Pierce v. Principi*, 18 Vet.App. 440, 445 (2004).

Finally, the Secretary stated that as a fact finder, the Board was allowed to determine that locking several weeks does not meet the standard of "frequent" in DC 5258. Sec. Br. at 14-15; R-11; R-332-37. But assessing whether the evidence meets a legal standard is a *legal* determination. *See Bagby v. Derwinski*, 1 Vet.App. 225, 227 (1991) ("While the underlying determinations may be factual—in this case, for example, the BVA could have determined as a factual matter that appellant was treated prior to service—whether those facts are sufficient to satisfy the statutory requirement that clear and unmistakable evidence be shown is a legal determination subject to de novo review."). And even if this was a factual determination, the Board would still be required to provide adequate reasons or bases. *See* 38 U.S.C. § 7104(d). Here, it simply concluded that locking several times per week was not "frequent" as that term is used in DC 5258. R-11. It did not explain any standards that it used in making this determination, and did not provide evidentiary support for finding it not frequent. Apa. Open. Br. at 12. Remand is required.

CONCLUSION

The Board's decision is inadequate because it came to a medical conclusion regarding the Veteran's knee instability, and the Secretary's argument that the Board appropriately relied on medical evidence is unavailing. Additionally, the Board failed to adequately explain why a higher rating under DC 5258 was not appropriate, in light

of evidence of record that the Veteran experienced frequent locking and effusions. Remand is required for the Board to readjudicate the Veteran's case under the correct interpretation of the law, and provide adequate reasons or bases for its conclusion.

Respectfully submitted,

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